IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1449

DAVID A. HARTMAN, RAYMOND V. MILLER, and RICHARD G. COOMBE,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Respondent Commonwealth of Virginia prays that a Writ of Certiorari be denied in regard to the final judgment of the Circuit of Prince William County, Virginia.

PROCEEDINGS BELOW

No formal opinion has been published in this case. The trial judge issued a letter opinion denying Petitioners' pretrial motions to suppress. The Supreme Court

of Virginia declined to review the trial court proceedings. The opinions, Orders and Judgments of these courts are set forth in the Appendix of the Petitioners.

JURISDICTION

The question presented here was first raised before trial in motions to suppress evidence. The trial judge denied the motions by letter opinion. Petitioners' cases were consolidated for trial, and they were convicted of sodomy in violation of Va. Code Sect. 18.2-361. Each petitioner was sentenced to five years in prison; the sentences were then suspended. A Petition for Appeal was filed in the Supreme Court of Virginia. On December 18, 1978, that court declined to review the case. The jurisdiction of this court is founded on 28 U.S.C. Sect. 1257(3).

QUESTIONS PRESENTED

Whether the Fourth Amendment is violated by police surveillance, with preexisting probable cause, of persons temporarily occupying a toilet stall in a public restroom, through small ceiling vents designed and constructed exclusively for that purpose.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourthteenth Amendment provides in part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Facts:

The facts in all three cases are nearly identical. Each of the petitioners was arrested for acts of sodomy committed inside a toilet stall in a public restroom on public property located at a rest area on Interstate 66 in Northern Virginia. On October 15, 1977, Petitioner Hartman was observed by Virginia State Trooper Gary A. Morris, who had positioned himself in the attic of a public restroom facility located in a rest area on westbound Interstate Highway 66 in Prince William County, Virginia. (Tr. I (1-6-78) 3). After receiving numerous complaints by concerned citizens of homsexual activity in the stalls, Trooper Morris maintained a surveillance of the restroom through a false vent with a dummy grate which had been installed by the Virginia Department of Highways for that specific purpose. (Tr. I 3, 5, 18; Tr. II (3-6-78) 28). The surveillance had gone on for one-half hour before Petitioner Hartman's arrest (Tr. I 4). The surveillance resulted in the arrest of the petitioners and many others.

From his position, Trooper Morris could see into the three toilet stalls in the restroom. Petitioner Hartman was observed by Trooper Morris to engage in an act of sodomy with another individual inside one of the stalls. (Tr. I 12-13; Tr. II 36). All of Trooper Morris' observations of Petitioner Hartman were made through this dummy vent. (Tr. I 14; Tr. II 37).

Petitioner Miller was observed by Virginia State Trooper D. L. Thompson in an identical fashion on October 15, 1977, in the men's restroom in the rest area on the eastbound side of Interstate 66 in Prince William County, Virginia (Tr. I 19-25; Tr. II 22-28). Petitioner Coombe was likewise observed by Trooper Thompson through the false vent on October 23, 1977, and arrested for committing an act of sodomy. (Tr. II 28-32).

Proceedings In The Court Below:

Petitioners Hartman and Miller's Fourth Amendment contention here was the subject of briefing before trial on a motion to suppress evidence. Petitioner Coombe made the identical argument in an oral motion on the day of trial. (Tr. II 11-22). The trial judge denied Petitioners Hartman and Miller's motion by letter opinion dated February 28, 1978, (Petitioners' Appendix at 1a), refused to reverse himself at trial (Tr. II 22), and denied Petitioner's Coombe's motion from the bench at trial. (Tr. II 21-22).

The trial judge's opinion reads as follows:

> Simply and briefly, I do not believe that it can be successfully argued that the defendants. . .are entitled to have a reasonable expectation of privacy under the circumstances and I would distinguish

> cases of this nature and hold inapplicable the principals enunicated by the Court in *Katz v. United States*, 389 U.S. 347, relied on by the defendants. (Petitioners' Appendix at 1a).

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT RAISE AN ISSUE UNDER THE FOURTH AMENDMENT BECAUSE THE DEFENDANTS NEITHER JUSTIFIABLY RELIED ON PRIVACY NOR WAS THEIR EXPECTATION OF PRIVACY ONE THAT SOCIETY IS PREPARED TO RECOGNIZE AS REASONABLE AND THEREFORE NO FOURTH AMENDMENT SEARCH OCCURRED.

The activities of the Police Officers in this case should not be tested by Fourth Amendment requirements because they do not violate the protection accorded individuals against unreasonable searches and seizures as provided by the Fourth Amendment and outlined by this Court in *Katz v. United States*, 389 U.S. 347 (1967). In determining what expectations of privacy are justifiable and reasonable the sensibilities and customs of the populace should be drawn upon. The quantity and quality of seclusion available to persons are in part, socially and culturally determined. Hence, in part, society and culture may be said to determine what sorts of privacy one may reasonably expect in certain situations. However, in order for the expectation to be considered justified it is not enough that it be merely reasonable. It may be reasonable that two persons engaging in homosexual activity five miles inside a forest expect privacy. Nevertheless, they would not be able to suppress the testimony of a park officer who had been located in the tree above watching them. A Fourth Amendment privacy

expectation must be based on more than a high probability of freedom from discovery.

This Court in *Katz* concluded that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth....". Justification is the basis for differentiating between those expectations which are merely reasonable and those which are to be constitutionally protected.

There cannot be any justifiable expectation of privacy on the part of persons engaged in homosexual acts in toilet stalls because such actions are perceivable by the public. Privacy in a public toilet stall can be justifiably expected only to the extent that the design of the public restroom permits.

Prominently, the guiding purpose in designing a public restroom is to separate the sexes. The semi-partitions about the toilet are provided merely to afford some physical protection to the occupant while in a vulnerable position. In the Commonwealth of Virginia the only justifiable expectation an occupant of a toilet stall with semi-partition has is that he can employ the stall in an acceptable manner free from the gaze of the opposite sex. Many public restrooms, especially shower rooms and restrooms in public schools are completely open. Indeed, part of a person can be seen while he is in the so-called "private area" because the stalls do not completely shield him from public view. Ones feet and the bottom part of ones legs can be seen. It can easibly be seen whether or not the occupant's pants are down, whether he stands, sits or is on his knees. Anyone can bend down and peer into a stall. Unmistakably, the occupant of a stall is visible from above by one who looks over the

semi-partition. Furthermore, spaces between the door and walls of the stall can be peered through to clearly reveal the occupant. When a stall is used for its intended purpose others outside the stall can observe that there is only one person in the stall and that he is either standing, sitting, tearing toilet tissue, reading a newspaper, flushing or giving off an odor. The fact is, any expectation of privacy is minimal. It is entirely unjustifiable that persons engaging in homosexual acts in public restroom stalls have a constitutionally protectable privacy expectation.

Just as unjustifiable would it be for persons employing a public restroom stall for activities other than its intended purpose such as gambling or fighting, to assert testimony of a police officer positioned above the stall at a vantage point should be suppressed because they expected privacy while gambling or fighting in the stall.

Petitioners overlook an important qualification placed upon the constitutional protections outlined in *Katz*. In noting that the "Fourth Amendment protects people not places", Justice Stewart also observed that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections." 389 U.S. at 351, 88 S. Ct. at 811.

The Respondent maintains that homosexual activities in a public restroom stall yet perceivable by outsiders who look through the openings between the door and walls of the stall, the large openings at the bottom and top of the stall, are acts exposed to the public gaze and therefore any expectation of privacy is unjustifiable.

In accord, it was held in *United States v. Jackson*, 588 F.2d 1046 (1979), that "defendants had no justifiable expectation of privacy with respect to their motel room conversations which were audible to the unaided

ears of government agents lawfully occupying the adjoining room by placing their ears next to the space at the bottom of the door connecting the two rooms."

Petitioners' application of the holding in *Katz* and Petitioners' "mirror-image" analogy of the facts in *Katz* to those in this case before the Court cannot withstand analysis.

The defendant in *Katz* was the sole occupant of the telephone booth which he employed for its intended purpose. Petitioners analogy falls in light of the fact that there were not two persons in the phone booth carrying-on an incriminating conversation. The phone both was not a mere partition. Passersby could not have easily listened in on the conversation because the booth design provided more than a mere partition.

Finally, the numerous complaints by concerned citizens of homosexual activity in the stalls evidence the unreasonableness and unjustifiability of Petitioners expectations of privacy.

II.

THIS CASE DOES NOT RAISE AN ISSUE UNDER THE FOURTH AMENDMENT BECAUSE THE DEFENDANTS EXPOSED THEIR ACTIVITIES TO THE PLAIN VIEW OF THE PUBLIC AND THEREFORE THE OBSERVATIONS BY THE POLICE OFFICERS WERE LAWFUL WITHOUT THE NECESSITY OF ESTABLISHING EITHER PRE-EXISTING PROBABLE CAUSE OR THE EXISTENCE OF A SEARCH WARRANT OR ONE OF THE TRADITIONAL EXCEPTIONS TO THE WARRANT REQUIREMENT.

In *Harris v. United States*, 390 U.S. 234 (1968), this Court held that a police officer's observation of that which is in plain view, where he has a right to be in the position to have that view is not a search. Any

evidence seized as a result of such a visual observation is not excludable on Fourth Amendment grounds. Just as what an officer sees where he is lawfully present is a nonsearch plain view, what he learns by reliance upon his other senses while so located is likewise not a search and thus per se lawful. In effect, the plain view doctrine "has been expanded to cover that evidence that can be perceived by the sense of smell or what the officer may hear", *United States v. Pagan*, 395 F. Supp. 1052 (D.P.R. 1975). Accordingly, where investigators obtained a motel room adjoining the room being used by persons suspected of being involved in a narcotics conspiracy and from that room by lying prone at the connecting door the officers overheard incriminating remarks by the conspirators, it was held in *United States v. Fisch*, 474 F.2d 1071 (9th Cir. 1973), that this conduct did not constitute a search. The court reasoned:

> The officers were exercising their investigative duties in a place where they had a right to be and they were relying upon their naked ears. So using their natural senses, they heard discussion of criminal acts. What was heard, however, was expressed by speakers who insist that they were justifiably relying upon their right of privacy, who sought to keep their conversation private, who "did not expect that law enforcement officers would be located just a few inches away from the crack below the door connecting the two adjoining rooms, and who thus conclude that "If one justifiably relies on his privacy any eavesdropping constitutes a search and seizure within the meaning of the Fourth Amendment."
>
> But it is clear from *Katz* that for suppression of overheard speech the speaker must have "justifiably relied" on his privacy.

> There must, first of all, have been a reliance on, an actual and reasonable expectation of, privacy. But beyond the individual's expectations, the needs of society are involved. The individual's subjective, self-centered expectation of privacy is not enough. We live in an organized society and the individual's expectation of privacy must be justifiable, "one that society is prepared to recognize as 'reasonable.' "
>
> The statements before us fail of suppression on both aspects.
>
> Here the conversations complained of were audible by the naked ear in the next room. True the listening ear was at the keyhole, so to speak, but another listening ear was also, at one time, on the bed in the middle of the room, where was heard the pilot's story. Appellants would have us divide the listening room into privileged or burdened areas, and the conversation into degrees of audibility to, we presume, the normal ear, thus a remark heard on the bed arguably admissible, but not those heard at the door, a loud remark admissible, arguably one uttered in "normal" tones, but definitely not one whispered. We find no precedent for a categorization involving such hairsplitting distinctions and we are not disposed to create one.

Essentially, the same reasoning supports the Respondent's position in this case. In assessing in a particular case whether an expectation of privacy is justified, the extent to which the incriminating objects, actions or conversations were out of the line of normal sight or hearing from contiguous areas where passersby or others might be is a primary consideration. In *United States v. Llanes,* 398 F.2d 880, (1968), the United States Court of Appeals, Second Circuit, where a narcotics agent stationed himself in the hallyway near the apartment door, which, though

locked, was hanging imperfectly, leaving a small opening and listened to the conversations of those inside the apartment, held such conversations to be knowingly exposed to the public, and the officer in overhearing the conversations did not violate the Fourth Amendment. In *Commonwealth v. Hemley,* 216 Pa Super 177, 623 A.2d 904 (1970), federal agents watched defendant's print shop where they suspected gambling slips were being printed. Because the shop windows were high above street level, the agents stationed themselves on a ladder 35 feet from the building and with the aid of binoculars observed the illicit activity through the window. Although no one could have seen in under normal circumstances, the court held that there could be no reasonable expectation of privacy because the windows were not shut. As long as the agents could see in from any place they had a right to be, no matter how they did it, there was no search for Fourth Amendment purposes.

Cases upon which Petitioner relies are clearly distinguishable from the case before this Court. Those cases, either involve *totally* enclosed public toilet stalls, or circumstances where the plain view doctrine was not applied. In two early cases, *Bielicki v. Superior Court* 57 Cal.2d 602, 371 P.2d 288 (1962), involving observation of *totally* enclosed public toilet stalls, and *Britt v. Superior Court,* 58 Cal.2d 469, 374 P.2d 817 (1962), involving stalls enclosed by partitions beginning 10 inches from the floor, police offices peering through pipes extending through the roof above the stalls observed the activities in restrooms for purposes of apprehending homosexuals who might there engage in sexual acts. Although the officers were in places where they had a right to be and did view the acts first-hand, the court found these stalls to be private places (the observations

revealed activities "which no member of the public could have seen") and held the searches to be of a general exploratory nature and therefore unreasonable and in violation of the Fourth Amendment.

When the court in *Bielicki* stated, "It is undisputed that the activities of peititioners witnessed by Officer Hetzel were not 'in plain sight' or 'readily visible and accessible', but rather were hidden from all but the type of exploratory search here conducted," it implied that if the public *could* have seen the illicit activity, then the plain view doctrine would be applicable and there would be no resulting search or Fourth Amendment violation. Furthermore, the outcome of *People v. Triggs*, 8 Cal.3d 884, 506 P.2d 232 (1973), was controlled by California's unique public policy expressed by the California legislature in Section 653N of the *Penal Code* declaring:

> Any person who installs or who maintains after April 1, 1970, any two-way mirror permitting observations of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor.

Indeed, the North Carolina Court of Appeals opposed the reasoning in *Triggs* by emphasizing the California public policy. In *State v. Jarrell*, 24 NC App 610, 211 S.E.2d 837 (1975), the prohibited act occurred near a window in the public area of a restroom with defendant Zepeda standing and maintaining a lookout and defendant Jarrell kneeling on the floor, out of sight from the exterior of the building. The police officer was secreted in the attic of the restroom from where he could observe the activities of patrons through a hole in the ceiling. While the court acknowledged the majority's statement in *Katz* that "the Fourth Amendment protects people, not places," it stressed Justice Harlan's concurring opinion that the answer to the question of what protection the Fourth Amendment affords to people generally requires reference to a "place." "Here," the North Carolina court stated, "the police officer, from a position where he had a right to be, was observing activities taking place in the open, public area of a public building...By using such a public place for their activities, defendants had no such expectation of privacy as society, or at least this Court, is prepared to recognize as 'reasonable'." 211 S.E.2d at 840. *See also: Moore v. State*, 355 So.2d 1219 (Fla. App. 1978).

The Supreme Court of Minnesota in *State v. Bryant*, 177 N. W. 2d 800 (1970) relying on California cases and the fact that once the stall door was closed "it was impossible to see into the stall from the public area of the restroom" held that testimony of police officer who, while stationed over a ventilator in ceiling above restroom in department store, observed accused and another perform an act of oral sodomy by means of a hole cut in partition separating toilet stalls, was inadmissable, as a product of unreasonable search.

Likewise, in *Kroehler v. Scott*, 391 F. Supp. 1114 (E.D. Pa. 1975) it was held that police who *drilled* holes in public restroom celings violated the Fourth Amendment. In reaching this conclusion that court relied on the California cases which in turn were based on California public policy as espoused in 653N of the California Penal Code. Any State court or legislature may constitutionally provide procedural protections to a greater extent than that required by the United States Constitution. The Commonwealth of Virginia has chosen not to provide protection to persons who engage in homosexual or other criminal activities in a toilet stall open to the public gaze.

The Commonwealth of Virginia has promulgated public policy which deems sodomy to be a felony. (Va. Code Section 18.2-361). The inconvenience of possibly being looked upon while in a public toilet stall, an inconvenience risked whenever others, especially children, are in the restroom, is outweighed by the Commonwealth's interest in enforcing its laws.

III.

ANY SEARCH CONDUCTED BY THE POLICE OFFICERS MET FOURTH AMENDMENT REQUIREMENTS.

The police officers had pre-existing probable cause before conducting the surveillance of the public restroom stalls as stipulated to by Petitioners in the suppression hearing. Exigent circumstances existed in that the suspects' proximity to their vehicles created a threat of escape. And finally the officers made arrests after a felony had been committed in their presence. Therefore, exigencies justified the warrantless intrusion and seizure.

CONCLUSION

For the reasons stated Respondent requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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